

Aug 25, 2017

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

JACK R. WHEELER,

Plaintiff,

v.

COMMISSIONER OF SOCIAL  
SECURITY,

Defendant.

No. 2:16-CV-00171-JTR

ORDER GRANTING  
DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT

**BEFORE THE COURT** are cross-motions for summary judgment. ECF No. 16, 17. Attorney Lora Lee Stover represents Jack R. Wheeler (Plaintiff); Special Assistant United States Attorney Jeffrey E. Staples represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and briefs filed by the parties, the Court **GRANTS** Defendant's Motion for Summary Judgment and **DENIES** Plaintiff's Motion for Summary Judgment.

**JURISDICTION**

Plaintiff filed an application for Supplemental Security Income (SSI) on June 8, 2012, Tr. 267, alleging disability since July 1, 1991, Tr. 223-229, due to an L1 compression fracture, depression, three crushed discs in his back, carpal tunnel

1 in his right wrist, a broken right toe, a torn meniscus in the right knee, a broken  
2 ankle, pins in his wrist, anxiety, a broken leg, and a broken shoulder that did not  
3 heal properly. Tr. 271. The application was denied initially and upon  
4 reconsideration. Tr. 147-150, 154-156. Administrative Law Judge (ALJ) Donna  
5 L. Walker held a hearing on October 2, 2014 and took testimony from Plaintiff,  
6 vocational expert, Daniel McKinney, and medical expert, Anthony Francis, M.D.  
7 Tr. 57-87. At the hearing, Plaintiff amended his alleged date of onset to the date of  
8 application, June 8, 2012. Tr. 59. The ALJ issued an unfavorable decision on  
9 November 3, 2014. Tr. 31-43. The Appeals Council denied review on March 29,  
10 2016. Tr. 1-7. The ALJ's November 3, 2014 decision became the final decision of  
11 the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §  
12 405(g). Plaintiff filed this action for judicial review on May 25, 2016. ECF No. 1,  
13 4.

#### 14 **STATEMENT OF FACTS**

15 The facts of the case are set forth in the administrative hearing transcript, the  
16 ALJ's decision, and the briefs of the parties. They are only briefly summarized  
17 here.

18 Plaintiff was 44 years old at the date of application. Tr. 223. Plaintiff  
19 received his GED in 1986 and attended some community college ending in 2005.  
20 Tr. 272. He reported his work history as a greenhouse worker, laborer, and  
21 landscape foreman. *Id.* Plaintiff reported that he stopped working on July 1, 2005  
22 due to his conditions. Tr. 271.

#### 23 **STANDARD OF REVIEW**

24 The ALJ is responsible for determining credibility, resolving conflicts in  
25 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,  
26 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,  
27 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d  
28 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is

1 not supported by substantial evidence or if it is based on legal error. *Tackett v.*  
2 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as  
3 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put  
4 another way, substantial evidence is such relevant evidence as a reasonable mind  
5 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402 U.S.  
6 389, 401 (1971). If the evidence is susceptible to more than one rational  
7 interpretation, the court may not substitute its judgment for that of the ALJ.  
8 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative  
9 findings, or if conflicting evidence supports a finding of either disability or non-  
10 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d  
11 1226, 1229-1230 (9th Cir. 1987). Nevertheless, a decision supported by  
12 substantial evidence will still be set aside if the proper legal standards were not  
13 applied in weighing the evidence and making the decision. *Browner v. Secretary*  
14 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988).

### 15 SEQUENTIAL EVALUATION PROCESS

16 The Commissioner has established a five-step sequential evaluation process  
17 for determining whether a person is disabled. 20 C.F.R. § 416.920(a); *see Bowen*  
18 *v. Yuckert*, 482 U.S. 137, 140-142 (1987). In steps one through four, the burden of  
19 proof rests upon the claimant to establish a prima facie case of entitlement to  
20 disability benefits. *Tackett*, 180 F.3d at 1098-1099. This burden is met once the  
21 claimant establishes that physical or mental impairments prevent him from  
22 engaging in his previous occupations. 20 C.F.R. § 416.920(a)(4). If the claimant  
23 cannot do his past relevant work, the ALJ proceeds to step five, and the burden  
24 shifts to the Commissioner to show that (1) the claimant can make an adjustment to  
25 other work, and (2) specific jobs exist in the national economy which the claimant  
26 can perform. *Batson v. Comm'r of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-1194  
27 (9th Cir. 2004). If the claimant cannot make an adjustment to other work in the  
28 national economy, a finding of "disabled" is made. 20 C.F.R. § 416.920(a)(4)(v).

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At step one, the ALJ found Plaintiff had not engaged in substantial gainful activity since June 8, 2012, the date of application. Tr. 33.

At step three, the ALJ found Plaintiff did not have an impairment or combination of impairments that met or medically equaled the severity of one of the listed impairments. Tr. 34.

the claimant can lift and/or carry up to 20 pounds occasionally (1/3 of the workday) and 10 pounds frequently (2/3 of the workday). He has unlimited ability to use bilateral upper extremities for pushing, pulling and reaching in all directions, including overhead, with the exception for light hand gross and fine finger manipulation that is limited to frequently. He can sit, stand and walk up to 6 hours each; he can frequently stoop and climb ramps, stairs, stoop; occasionally climb ladders, ropes, scaffolds, kneel, crouch, or crawl and unlimited ability to balance. He has unlimited visual and communicative abilities and unlimited environmental abilities, except that he should avoid concentrated exposure to vibration, and hazards, such as unprotected heights. He can carry out short, simple instructions as well as some detailed instructions; he can sustain an ordinary routine without special supervision; accept instructions and respond appropriately to criticism from supervisors. He can work in coordination with or in proximity to co-workers without being distracted by them; maintain socially appropriate behavior and adhere to basic standards of neatness and cleanliness, but he works best with no more than superficial contact with co-workers and the general public.

Tr. 36. The ALJ found Plaintiff had no past relevant work as defined by the regulations. Tr. 41.

At step five, the ALJ determined that, considering Plaintiff's age, education, work experience, residual functional capacity, and the testimony of the vocational expert, there were other jobs that exist in significant numbers in the national economy Plaintiff could perform, including the jobs of checker II, automatic packer-operator, and inspector packer. Tr. 42. The ALJ concluded Plaintiff was not under a disability within the meaning of the Social Security Act at any time from the date of application, June 8, 2012, through the date of the ALJ's decision, November 3, 2014. Tr. 42.

### ISSUES

The question presented is whether substantial evidence supports the ALJ's decision denying benefits and, if so, whether that decision is based on proper legal standards. Plaintiff contends that the ALJ erred by (1) failing to properly assess Plaintiff's symptom statements; (2) failing to properly assess Plaintiff's residual functional capacity, and (3) finding Plaintiff capable of substantial gainful activity at step five. ECF No. 16 at 9-10.

### DISCUSSION

#### A. Plaintiff's Symptom Statements

Plaintiff contests the ALJ's evaluation of his symptom statements. ECF No. 16 at 12-13.

It is generally the province of the ALJ to make determinations regarding the credibility of Plaintiff's symptom statements, *Andrews*, 53 F.3d at 1039, but the ALJ's findings must be supported by specific cogent reasons, *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9th Cir. 1990). Absent affirmative evidence of malingering, the ALJ's reasons for rejecting the claimant's testimony must be "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996); *Lester v. Chater*, 81 F.3d 821, 834 (9th Cir. 1995). "General findings are insufficient:

1 rather the ALJ must identify what testimony is not credible and what evidence  
2 undermines the claimant's complaints." *Lester*, 81 F.3d at 834.

3 The ALJ found Plaintiff less than fully credible concerning the intensity,  
4 persistence, and limiting effects of his symptoms. Tr. 37, 39. The ALJ reasoned  
5 that Plaintiff was less than fully credible because (1) his testimony and allegations  
6 were inconsistent with objective medical evidence, (2) he made inconsistent  
7 statements regarding his abilities, and (3) his allegations were inconsistent with his  
8 reported activities of daily living. Tr. 39.

9 Plaintiff failed to challenge any of the ALJ's reasons with specificity. *See*  
10 ECF No. 16 at 12-13. Instead, Plaintiff asserted that his pain complaints should  
11 not have been rejected. *Id.* Because Plaintiff failed to challenge the ALJ's  
12 rationale, the Court will not consider the issue of credibility. *See Carmickle v.*  
13 *Comm'r, Soc. Sec.*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008). The Ninth Circuit  
14 explained the necessity for providing specific argument:

15 The art of advocacy is not one of mystery. Our adversarial system relies  
16 on the advocates to inform the discussion and raise the issues to the  
17 court. Particularly on appeal, we have held firm against considering  
18 arguments that are not briefed. But the term "brief" in the appellate  
19 context does not mean opaque nor is it an exercise in issue spotting.  
20 However much we may importune lawyers to be brief and to get to the  
21 point, we have never suggested that they skip the substance of their  
22 argument in order to do so. It is no accident that the Federal Rules of  
23 Appellate Procedure require the opening brief to contain the  
24 "appellant's contentions and the reasons for them, with citations to the  
authorities and parts of the record on which the appellant relies." Fed.  
R. App. P. 28(a)(9)(A). We require contentions to be accompanied by  
reasons.

25 *Independent Towers of Wash. v. Wash.*, 350 F.3d 925, 929 (9th Cir. 2003).<sup>1</sup>

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27 <sup>1</sup>Under the current version of the Federal Rules of Appellate Procedure, the  
28 appropriate citation would be to FED. R. APP. P. 28(a)(8)(A).

Moreover, the Ninth Circuit has repeatedly admonished that the court will not “manufacture arguments for an appellant” and therefore will not consider claims that were not actually argued in appellant’s opening brief. *Greenwood v. Fed. Aviation Admin.*, 28 F.3d 971, 977 (9th Cir. 1994).

## **B. Residual Functional Capacity**

Plaintiff argues the ALJ erred in her formation of the residual functional capacity determination. ECF No. 16 at 13-15. Specially, Plaintiff asserts that the ALJ ignored limitations regarding his pain and his ability to stand and/or walk for extended periods, that the ALJ did not take Dr. Francis’s full opinion into consideration, and that the ALJ failed to include all the limitations opined by Dr. Bailey. *Id.*

A claimant’s residual functional capacity is “the most [a claimant] can still do despite [his] limitations.” 20 C.F.R. § 416.945(a). In formulating a residual functional capacity, the ALJ weighs medical and other source opinions and also considers the claimant’s credibility and ability to perform daily activities. *See, e.g., Bray v. Comm’r, Soc. Sec. Admin.*, 554 F.3d 1219, 1226 (9th Cir. 2009).

### **1. Additional Limitations**

Plaintiff asserts the existence of additional limitations resulting from pain and additional limitations in his ability to stand and/or walk for extended periods. ECF No. 16 at 13-14. However, Plaintiff failed to state what these limitations were with any specificity or assert how the medical record supported their existence. As such, the Court is unable to consider whether or not undefined limitations are supported by substantial evidence.

### **2. Anthony Francis, M.D.**

Plaintiff asserts that Dr. Francis opined that if pain testimony regarding were accepted as credible, he would be limited to light work. ECF No. 16 at 14.

At the October 2, 2014 hearing, Dr. Francis was asked whether a medium or light residual functional capacity was more appropriate in this case. Tr. 65. He

1 responded with “Well just based on the pathology that’s present and following  
2 Social Security rules a medium [residual functional capacity] would be  
3 appropriate. If there are other facts such as chronic pain or testimony, that type of  
4 thing that it could be reasonably be reduced down to a light [residual functional  
5 capacity] with the same limitations.” *Id.* Dr. Francis was asked if the limitation to  
6 light work was “Assuming credibility?” to which he answered, “Yes.” *Id.*

7 In his decision, the ALJ characterized Dr. Francis’s opinion as limiting  
8 Plaintiff to “a medium to light work level, . . .” Tr. 39. The ALJ then gave his  
9 opinion “significant weight.” *Id.*

10 Here, Plaintiff’s assertions that his pain testimony should be afforded  
11 significant weight were not sufficient to be addressed in detail by this Court. *See*  
12 *supra*. As such, the Court refused to disturb the ALJ’s credibility determination.  
13 Seeing that Dr. Francis’s limitation to light work required credible pain testimony  
14 as a precursor, the Court finds that the ALJ’s reliance on Dr. Francis’s medium to  
15 light work limitation is without error.

### 16 **3. James Bailey, Ph.D.**

17 Plaintiff asserts that the ALJ failed to include all the limitations opined by  
18 Dr. Bailey in the residual functional capacity. ECF No. 16 at 14-15.

19 On January 4, 2013, Dr. Bailey reviewed Plaintiff’s file and completed a  
20 Mental Residual Functional Capacity Assessment (MRFCA). Tr. 135-137. As to  
21 Plaintiff’s sustained concentration and persistence limitations, he gave Plaintiff a  
22 moderate<sup>2</sup> limitation in the abilities to maintain attention and concentration for  
23 extended periods, to perform activities within a schedule, maintain regular  
24 attendance, and be punctual within customary tolerances, to complete a normal  
25 workday and workweek without interruptions from psychologically based

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26  
27 <sup>2</sup>The term moderate is undefined throughout Dr. Bailey’s opinion. Tr.135-  
28 137.



1 symptoms, and to perform at a consistent pace without an unreasonable number  
2 and length of rest periods. Tr. 136. In the narrative section of the form, he stated,  
3 “[w]hen sober, [claimant] is capable of at least [simple repetitive tasks and] likely  
4 some [complex detailed tasks, especially] those well learned. Sustained  
5 [concentration, persistence and pace and] attendance will vary [due to  
6 psychological symptoms] and subjective somatic complaints. Nonetheless [he is]  
7 capable of productive work [within] physical limitations.” *Id.* As to Plaintiff’s  
8 social interaction limitations, Dr. Bailey gave him a moderate limitation in the  
9 ability to interact appropriately with the general public. *Id.* In the narrative  
10 section, Dr. Bailey stated “[b]est [with] superficial social interactions in the  
11 workplace.” Tr. 137. As to Plaintiff’s adaptation limitations, Dr. Bailey gave him  
12 a moderate limitation in the ability to respond appropriately to changes in the work  
13 setting. *Id.* In the narrative section, Dr. Bailey stated “[c]apable of appropriate  
14 response to simple straightforward changes in the workplace. [Symptoms] may  
15 interfere [with] his ability to always respond approp[riately] to changes he  
16 perceives as personally negative. Able to avoid [normal] hazards, travel, and  
17 coop[erate with] plans made by self [and] others.” *Id.* The ALJ gave Dr. Bailey’s  
18 opinion “significant weight.” Tr. 38.

19 Plaintiff argues that the ALJ failed to include the moderate limitations in the  
20 residual functional capacity determination. ECF No. 16 at 14. However, the  
21 Program Operations Manual System<sup>3</sup> (POMS) DI 24510.060 details Social

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23 <sup>3</sup>The POMS does not impose judicially enforceable duties on the Court or  
24 the ALJ, but it may be “entitled to respect” under *Skidmore v. Swift & Co.*, 323  
25 U.S. 134 (1944), to the extent it provides a persuasive interpretation of an  
26 ambiguous regulation. *See Christensen v. Harris Cnty.*, 529 U.S. 576, 587-588,  
27 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000); *Lockwood v. Comm’r Soc. Sec. Admin.*,  
28 616 F.3d 1068, 1073 (9th Cir. 2010). Here, the issue is not determining the

1 Security's Operating Policy as to the MRFCA forms complete by psychological  
2 consultants and directs that the moderate limitations provided by Dr. Bailey do not  
3 constitute his opinion. While the provision speaks specifically to Form SSA-4734-  
4 F4-SUP, the Court finds that the premise of how a MRFCA provided by the  
5 agency is to be read can be extrapolated from this provision. Accordingly, the  
6 section of the form that includes mental function items with limitations ranging  
7 from "not significantly limited" to "markedly limited," "is merely a worksheet to  
8 aid in deciding the presence and degree of functional limitations and the adequacy  
9 of documentation and does not constitute the [residual functional capacity]  
10 assessment." POMS DI 24510.060. Instead, the actual residual functional  
11 capacity assessment is recorded in the narrative provided on the form, explaining  
12 the conclusions indicated in the moderate limitations expressed above the  
13 narrative. *Id.* Therefore, the opined residual functional capacity assessment was  
14 not the moderate limitations given by Dr. Bailey, but the narrative sections.

15 Because the relevant opinion was contained in the narrative section, Dr.  
16 Bailey's opinion is adequately addressed in the ALJ's residual functional capacity  
17 determination.

### 18 **C. Step Five**

19 Plaintiff argues that the ALJ erred in finding him capable of substantial  
20 gainful activity at step five. ECF No. 16 at 10. Plaintiff premised this argument on  
21 the assertion that the ALJ failed to include all his limitations in the residual  
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23 meaning of an ambiguous regulation, but instead understanding how to correctly  
24 read a form produced and distributed by the Social Security Administration to its  
25 medical consultants. Therefore, by relying on the POMS provision in this case, the  
26 Court is not allowing the provision to set a judicially enforceable duty on the ALJ,  
27 but only using it as a guide to define the parameters of a medical consultant's  
28 opinion on an agency supplied form.

1 functional capacity determination. *Id.* at 15. However, since this Court has found  
2 that there was no error in the ALJ's residual functional capacity determination,  
3 there is no resulting error in step five.

#### 4 CONCLUSION

5 Having reviewed the record and the ALJ's findings, the Court finds the  
6 ALJ's decision is supported by substantial evidence and free of harmful legal error.  
7 Accordingly, **IT IS ORDERED:**

8 1. Defendant's Motion for Summary Judgment, **ECF No. 17**, is  
9 **GRANTED.**

10 2. Plaintiff's Motion for Summary Judgment, **ECF No. 16**, is **DENIED.**

11 The District Court Executive is directed to file this Order and provide a copy  
12 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Defendant**  
13 **and the file shall be CLOSED.**

14 **IT IS SO ORDERED.**

15 DATED August 25, 2017.



A handwritten signature in black ink, appearing to be "M" or "Rodgers", is written above the printed name.

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JOHN T. RODGERS  
UNITED STATES MAGISTRATE JUDGE